In the Supreme Court
OF THE
United States

OCTOBER TERM, 1964

No. 399

UNITED STATES OF AMERICA,
Petitioner,

vs.

ARCHIE BROWN,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF RESPONDENT

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QUESTION PRESENTED

The Government defines the question in these words:

> "Whether 29 USC 504, which makes it unlawful for a member of the Communist Party to serve as an officer, director, trustee, or member of the executive board of a labor organization, is constitutional." (Govt. Br. 2.)

This formulation is both imprecise and incomplete. It is imprecise because it glosses over the fact that

the statute, far from declaring the object of proscription to be "unlawful" (no such word, in fact, is found in the statute), or establishing an administrative method to regulate the manner or content of the service rendered to a union by a Communist Party member, or creating an injunctive proceeding to prevent the continuance of such service, or withdrawing any governmental privilege on account of it, or allowing any civil action or extraordinary writ to cope with any injury occasioned or threatened by it, provides solely and exclusively that it is a crime against the United States to be contemporaneously a Communist (or ex-Communist of less than five years standing) and a union official; for which, without proof of anything more, and to the exclusion of any consideration of personal intent or ability to commit a wrong, a man may be fined and imprisoned.

More accurate is the question to which seven of the eight Judges of the Court of Appeals addressed themselves:[1]

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[1] Judge Merrill, in an opinion in which he was joined by Judges Jertberg, Koelsch, Browning and Duniway, held the statute to be violative of respondent's First and Fifth Amendment rights, and ordered Brown's conviction reversed and the indictment dismissed. Judges Chambers and Barnes, dissenting, voted to affirm. Judge Hamley, without reaching the same constitutional questions, wrote that he "would reverse and remand for a new trial" on account of the trial Court's direction to the jury that the Local's executive board on which Brown served was, as a matter of law, within the purview of the statute. His opinion expresses agreement with holdings in the Third, Fifth and Sixth Circuits that such an instruction violates the respondent's constitutional right to a jury trial as guaranteed by the Sixth Amendment. (R. 276; 334 F. 2d 488 at 503.)

The fact that Judge Hamley's concern for respondent Brown's Sixth Amendment rights led him to vote for reversal on that

> ". . . whether criminal punishment of any and all Communist Party members who become union officers, regardless of lack of intent to bring about the evil the statute was designed to prevent, or to further other unlawful aims of the Party, infringes the guarantees of the First and Fifth Amendments." (R. 254; 334 F.2d 488 at 492.)

The Government's formulation is incomplete because adequate treatment of the constitutional issues involved requires both mention and discussion of the fact that the statute punishes the holding of union office, not only by a person who is presently a Communist Party member, but also by anyone who, though having long since terminated Party membership, has held such membership at some time within the five years preceding his term of union office. The relevance of past Communist Party membership to the case here, arises from this Court's practice of appraising a statute's inhibitory effect upon First Amendment rights "in other factual contexts besides that at bar" (*NAACP v. Button* [1963], 371 U.S. 415 at 432.)

Because, therefore, the Government deals with this statute—a criminal statute—as though it were nothing more than a revised version, newly-outfitted in more

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ground, is scarcely a basis for concluding that, if he had reached the questions decided by the majority, his concern for Brown's constitutional rights under the First and Fifth Amendments would have been any the less. The Government's statement, therefore that the "court, by a vote of 5 to 3, ordered the conviction set aside and the indictment dismissed. The court ruled that Section 504 * * * is unconstitutional under the First Amendment and under the due process clause of the Fifth Amendment"—(Govt. Br. 4), permits an inference, assuredly unintentional, that the constitutional issues decided by the Court were by the narrow margin of 5 to 3, when in fact they were not.

ingeniously designed but essentially undifferent raiment, of the same administrative procedure embodied in the now-defunct Section 9(h), its brief fails to come directly to grips with the towering constitutional obstacles that stand in the path of this incredible and unprecedented piece of legislation.

STATEMENT

Archie Brown, the respondent, has been a working longshoreman on the San Francisco docks for more than a quarter of a century. (R. 166-167, 183, 190.). During all of this time, it was his general reputation on the waterfront that he was a Communist. (R. 184.) Far from ever seeking to conceal his Communist affiliations, he made at a public meeting at Stanford University on May 23, 1960 a statement on which the Government here relies (Govt. Br. 5), "I have been a member of the Communist Party for 25 years and I am now a member of the Communist Party." (R. 114.) A Government witness, who had served as an undercover operative for the Federal Bureau of Investigation within the Communist Party, testified that Brown was known only by his true name both inside and outside Party circles. (R. 146.) Concerning the Communist meeting in New York described by her to which the Government refers (Govt. Br. 6-7), she said that Brown registered at the hotel under his true name. (R. 149.)

Four prominent and long-time leaders of the International Longshoremen's and Warehousemen's Union

testified that Brown enjoys among his fellow trade unionists a good reputation for law-abidingness. (R. 173, 184, 190, 193.) The esteem in which he is held by the union's members may be judged from the fact that he was elected to the executive board of his local union, Local 10, ILWU, for consecutive one-year terms in 1959, 1960 and 1961. (Govt. Br. 4; see also R. 34-36, 79.) In these years the membership of the local union numbered between 4,000 and 5,000 men. (R. 65-66.) The executive board consists of 35 persons elected to it by the membership (R. 71) plus six titled officers, likewise elected—president, honorary vice-president, secretary-treasurer, and three business agents (R. 67-68)—a total, therefore, of 41 persons.

Nominations for office are annually initiated by means of a written petition signed by at least 50 members in good standing; all nominations are presented and read aloud at two successive meetings of the union membership. Any member may object to a nominee and the membership votes upon the objection; all nominations must receive approval of the membership by a majority vote. (R. 68-70.) To insure that the elections for office are fairly held and that ballots are honestly counted, the union rents voting machines from the City and County of San Francisco, and employs City Hall personnel to supervise the distribution, voting, and tabulation of ballots. (R. 66-67.)

The evidence is uncontradicted that a strike by Local 10 can be called only after compliance with an elaborate procedure requiring in the first instance a

majority vote in a specially advertised meeting with not less than 1,000 members in attendance to constitute a quorum; followed by a secret referendum ballot of all union members of whom a majority must vote in favor of striking; and followed further by steps to secure strike sanction from the International Union. (Constitutions of International Union and of Local 10, Govt. Exs. 1 and 2; R. 32-33, 76-77.) Evidence that the local executive board has never called a strike was, upon motion of the Government, stricken from the record. (R. 75.) Defense efforts to prove that the union itself has not been involved in a strike since the year 1948 (R. 77-78), and that it received in the years 1960 and 1961 public commendation from the Assembly of the State of California and from the Mayor and Supervisors of the City and County of San Francisco for the "epochal achievement" brought about by the union and the employers "through the processes of peaceful collective bargaining," were rejected by the trial court. (R. 111-112, 193, 196.)

Brown's service on the board was established by the introduction in evidence of the minutes of executive board meetings. These showed him in attendance on numerous occasions, recorded the fact that he had been the author of some motions and had seconded others, and also that various resolutions or statements of position were offered by him from time to time. It was never denied by the defense that Brown was "serving" on the executive board (R. 52); in fact, the defense pressed on the trial court that one issue to be determined was whether "he did so with the

specific intent that his services thereon should bring about an interference with or disruption of interstate commerce (for political considerations)." (R. 41.) The Government stoutly contested the assertion that the content of Brown's actions was relevant to any issue here. Nevertheless, under the claim that it bore the burden of demonstrating Brown's "active," as contrasted with "passive" membership on the board, the Government selected from the minutes of the board, and read to the jury, a resolution submitted by Brown which was highly critical of the House Committee on Unamerican Activities and of the San Francisco Police Department. (R. 52-54.) If, indeed, a burden of proving "active" membership existed because of this Court's decision in *Scales v. United States* (1961), 367 U.S. 203, it was a burden of proving not only that Brown was an "active" member, but, in the words of the Court, an active member "having also a guilty knowledge and intent" (at p. 228).

Since the Government was allowed to read portions of the minutes, the defense vigorously urged that there should be read into evidence "everything said or done" by respondent during his service on the executive board, and this was permitted. (R. 90.) From this evidence of all the actions taken by Brown and all the statements made by him during the 3 years he served as a member of the executive board, the jury could only have found that he never advocated or suggested illegal or other improper activity, that he had never proposed a political strike, and

that he never urged or engaged in any action whatsoever from which any criminal intent, or desire to disrupt commerce, could be inferred. (Govt. Ex. 7; R. 37, 40; Def. Exh. C; R. 109-110.) In final summation to the jury, however, the efforts of defense counsel to argue that this evidence should be considered in determining whether Brown possessed any criminal intent, were repeatedly interrupted by Government counsel, whose objections were uniformly sustained. (R. 223-233.) Moreover, stock instructions, such as are traditionally given in cases dealing with the subject of intent in criminal cases, though submitted, were refused. (R. 11-18.)

The Government introduced evidence that in 1959 the Secretary of Labor directed the attention of Mr. Harry Bridges, president of the International Union, to the provisions of Section 504, including that portion which makes it a crime for "any labor organization or officer thereof, knowingly and wilfully to permit any person to assume or hold any office or paid position contrary to" the prohibition against the holding of union office by a Communist Party member. This evidence showed that Mr. Bridges was requested to furnish the Secretary with a written list of any such persons, and to advise what action the Union was taking in regard to them. (R. 43-44.) Mr. Bridges replied, through the union's general counsel, that in the judgment of counsel Section 504 was unconstitutional because it violated the provisions of "at least the First and Fifth Amendments to the Constitution of the United States" and that they had so advised

Mr. Bridges; that counsel were unable to find in Section 504 either authority in the Secretary to request such information, or affirmative duty on the part of Mr. Bridges to undertake the various investigations which might be necessary to obtain such information, and had likewise so advised Mr. Bridges; and finally, that the law provided "no standards of guidance or evaluation" for the "burdensome and oppressive inquisition" which he was being called upon to undertake, and that Mr. Bridges was likewise so advised.[2] (R. 44-46.)

Testimony was received from Mr. Bridges that the enactment of Section 504 was a subject of discussion at many union meetings addressed by him, in which he said that "due to this law, we could no longer operate the Union as a democratic institution, operate it honestly, let the membership elect whom they chose as officers. We could no longer follow and support trade union principles, vital trade union principles which we knew from experience were vital to our existence, and that our union would be the first union attacked under this law for political purposes."[3] (R.

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[2]Subsequently, it was learned that the Department of Justice concurred in the opinion that the statute contains no provision requiring the union or its officers to report on the "communist or criminal status" of union officials and employees. (R. 156-158.)

[3]He was right in his prediction, for this appears to be the only prosecution thus far brought, based on Communist Party membership, since enactment of 504. It is reasonable to suppose that some of the ballots cast for respondent Brown in the union elections reflected, not an endorsement of the tenets of Communism, but what the Court of Appeals called "a determined assertion of the rights in question in face of the regulation". (R. 258; 334 F.2d 488 at 495.) The view expressed by Bridges that the statute would impair the rights of association and franchise of the union

168.) But an offer of proof, that the respondent Brown was in attendance at a meeting addressed by a union attorney, analyzing Section 504 and challenging its constitutionality, was rejected. (R. 153-156.) Likewise rejected was an offer of proof that Brown himself consulted an attorney of his choice, received legal advice that the statute was, in the attorney's opinion, unconstitutional, and that Brown acted in reliance upon that advice from counsel. (R. 159-160.) Thus, while the Government was permitted to show that respondent obtained personal knowledge of the Congressional enactment of Section 504, the defense was prevented from proving the full extent of his knowledge on the subject.

The trial court gave the case to the jury on the prosecution's theory alone, namely, that if the evidence showed respondent to have wilfully served as a member of the union executive board and the Communist Party at the same time, he was to be found guilty. (R. 237.) The defense requested instructions that would have given to the jury for its determination such issues as the presence or absence of criminal intent on respondent's part; the presence or absence of any power on his part to cause a strike or other interruption of commerce, as bearing on his intent or ability to commit punishable conduct; the presence

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membership, would doubtless carry particular weight with his listeners; they had known and supported him as a person who more than once was engaged in notable instances of defending constitutionally protected rights. See *Bridges v. California* (1941), 314 U.S. 252; *Bridges v. Wixon* (1945), 326 U.S. 135; *Bridges v. United States* (1953), 346 U.S. 209; *United States v. Bridges* (1955), 133 F.S. 638 (N.D. Calif.).

or absence of evidence that he had ever attempted or counseled anything of the sort; the fact of his reliance on the advice of counsel and the appropriate consideration to be given that fact; and whether, from the evidence, the executive board on which Brown served possessed any power to call or cause any strike, as bearing on the issue of the existence or non-existence, or the clear and present danger, of any evil against which the Congress had legislated. All these requests were denied. (R. 11-18.) Given, as it was, a virtual direction to convict, the jury did so. (R. 8, 248.)

Brown was sentenced by the Court to serve a prison term of six months. (R. 8-9.)

SUMMARY OF ARGUMENT

The First Amendment protects from legislative interference the right of persons peaceably to associate with one another for lawful purposes. (*Cox v. Louisiana*, No. 24, this Term, decided January 18, 1965.) Among the associational rights thus protected are those which seek objectives of an economic nature (*Brotherhood of Railroad Trainmen v. Virginia ex rel. Virginia State Bar* [1964], 377 U.S. 1; *Thomas v. Collins* [1945], 323 U.S. 516), as well as those that are political (*DeJonge v. Oregon* [1937], 299 U.S. 355.) Neither the fact that a person exercises a full range of associational rights with his fellow trade unionists (*Thornhill v. Alabama* [1940], 310 U.S. 88), nor his active participation in a political organization (*Yates v. United States* [1957], 354 U.S. 298) can be

per se a violation of the criminal law. No transformation of these rights occurs when they are contemporaneously exercised by an individual, and such exercise must therefore be governed by well-established standards applicable to the guarantees attending speech, press and association. Since it is the substance, not the form, with which we are concerned, no significance may properly rest upon the effort to attach to speech the label of "conduct." Respondent therefore possesses constitutionally protected rights both to serve as an officer of his trade union and to be a Communist; and the members of his union are similarly protected in their desire to elect him to serve (*Brotherhood of Railroad Trainmen v. Virginia ex rel. Virginia State Bar* [1964], 377 U.S.1.)

Section 504 of the Labor Management Reporting and Disclosure Act of 1959, 73 Stat. 519, 525; 29 USC 504, on its face violates the constitutional command of the First Amendment by its declaration that criminality flows from the contemporaneous joint assertion of otherwise severally protected trade union and political rights. It impermissibly imposes punishment without proof that the person punished possesses either intent or ability to engage in any criminal enterprise, and it prohibits any effort on his part to establish the absence of these factors. It thus abridges rights guaranteed by the Fifth Amendment as well as by the First. (*Noto v. United States* [1961], 367 U.S. 290.)

The statute is furthermore violative of Article I, Section 9, Clause 3 of the Constitution as both a bill

of attainder (*Lovett v. United States* [1946], 328 U.S. 303; *Ex Parte Garland,* 4 Wall. [71 U.S.] [1867] 333; *Cummings v. Missouri,* 4 Wall. [71 U.S.] [1867] 277), and an *ex poste facto* law (*Bouie v. City of Columbia* [1964], 378 U.S. 343; *Thompson v. Utah* [1893], 170 U.S. 343; *Calder v. Bull,* 3 Dall. [3 U.S.] [1798] 386.)

A statute which is so unprecedented in its sweep and employs the maximum form of force to require adherence to it can find support neither in reason nor authority. The Government's effort to save the statute rests in essence on two decisions only of this Court (*Board of Governors v. Agnew* [1947], 329 U.S. 441, and *American Communications Association v. Douds* [1950], 339 U.S. 382). Reliance on *Agnew* is wholly misplaced for it did not involve the exercise of First Amendment Rights nor was it a criminal prosecution. *Douds* likewise was not a criminal prosecution; and its rationale with respect to First Amendment rights has been steadily disapproved by this Court. (*Schware v. Board of Bar Examiner* [1957], 353 U.S. 232; *Yates v. United States* [1957], 354 U.S. 298; *Scales v. United States* [1961], 367 U.S. 203; *Aptheker v. Secretary of State* [1964], 378 U.S. 500.) Further resort to its fundamental premises would only be productive of harm to the democratic fabric of the Nation, and the case should be overruled. But in any event it cannot properly be said to support a statute which employs the threat of imprisonment in order to compel a vast number of persons into at least a partial surrender of their constitutionally pro-

tected rights, and as to some of them, to deprive them of all opportunity to hold union office despite a readiness to renounce the associations to which Congress objects.

We show that the statute at bar is so broad and indiscriminate in its reach as to be unconstitutional under the provisions of the Fifth Amendment alone (*Aptheker v. Secretary of State* [1964], 378 U.S. 500; *Shelton v. Tucker* [1960], 364 U.S. 479), and that the arguments advanced by the Government, based on the congressional prerogative and the legislative history of the statute, are without merit.

ARGUMENT

I

SECTION 504 UNCONSTITUTIONALLY RESTRICTS RESPONDENT'S FIRST AMENDMENT RIGHTS.

A. Respondent's association with the Communist Party is a protected right.

The respondent's association with others, to engage in peaceable political activity, is protected by the First Amendment against abridgement by legislative enactment. *Cox v. Louisiana*, No. 24, this Term, decided January 18, 1965; *Bates v. Little Rock* (1960), 361 U.S. 516, 523; and *DeJonge v. Oregon* (1937), 299 U.S. 353, 364.[4] It follows that neither his membership nor his holding office in the Communist Party can be

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[4]Accord: *Aptheker v. Secretary of State* (1964), 378 U.S. 500, 507; *NAACP v. Alabama ex rel. Flowers* (1964), 377 U.S. 288, 307; *Brotherhood of Railroad Trainmen v. Virginia ex rel. Virginia State Bar* (1964), 377 U.S. 1, 5; *Gibson v. Florida Legisla-*

made, without more, the basis for criminal punishment. *Noto v. United States* (1961), 367 U.S. 290; *Yates v. United States* (1957), 354 U.S. 298; *Herndon v. Lowry* (1937), 301 U.S. 242; *cf. Fiske v. Kansas* (1927), 274 U.S. 380 (I.W.W.) The fact that Congress has seen fit, in Section 4(f) of the Internal Security Act of 1950, 64 Stat. 987, 50 USC §§ 781 et seq., to say substantially the same thing (see *Scales v. United States* (1961), 367 U.S. 203, 207), does not dilute the constitutional vitality of respondent's right, nor transform the source of its origin. The right to think as one will, and to speak as one thinks, and to assemble with others of like mind and purpose, is one of the associational rights vouchsafed since the year 1789 to all who engage in political activity and advocacy, regardless of its content. It is a right which antedated Section 4(f); it requires no Congressional sanction; and, it may be hoped, the right will remain undisturbed as part of the fundamental liberties of the people, whatever convolutions may hereafter be taken by Section 4(f) or any other Act of Congress. As to these assertions, we do not read the Government's brief as raising any essential legal point of difference between us.

B. Respondent's service on the Executive Board of the Union is a protected right.

The respondent's association with others, to engage in the familiar variety of trade union activities, is sim-

tive Investigation Committee (1963), 372 U.S. 539, 543; *NAACP v. Button* (1963), 371 U.S. 415, 437; *Louisiana ex rel. Gremillion v. NAACP* (1961), 366 U.S. 293, 296; *NAACP v. Alabama ex rel. Patterson* (1958), 357 U.S. 449; *Thomas v. Collins* (1945), 323 U.S. 516, 539.

ilarly a right encompassed within the protected freedoms of the First Amendment. *Brotherhood of Railroad Trainmen v. Virginia ex rel. Virginia State Bar* (1964), 377 U.S. 1, 5; *Lincoln Federal Labor Union v. Northwestern Iron & Metal Co.* (1949), 335 U.S. 525, 531; *Thornhill v. Alabama* (1940), 310 U.S. 88, 103; *Senn v. Tile Layers Protective Union* (1937), 301 U.S. 468, 478. It follows that neither his membership nor his holding office in Local 10, ILWU, can be made, without more, the basis for criminal punishment. *Staub v. City of Baxley* (1958), 355 U.S. 313, 322, n. 5; *Thomas v. Collins* (1945), 323 U.S. 516, 532. That Congress has seen fit to afford statutory protection to the exercise of that right (49 Stat. 449, 29 USC 151 et seq.), does not alter the fact that it is the Constitution, not Congress, whence the right springs. *Cafeteria Employees Union v. Angelos* (1943), 320 U.S. 293, 295; *Senn v. Tile Layers Protective Union* (1937), 301 U.S. 468, 478. Were the Labor Management Relations Act to be repealed in its entirety, the right to join a union and become one of its elected officers would survive that repeal, for it is a right indistinguishable from that which is exercised by all who comprise organizations of the people engaging in serious pursuits, and equally indispensable to democratic expression in the national life of a free people. As to these assertions, it would appear that the Government disagrees, for it is said that "the right to be a union officer * * * is not a constitutionally protected 'liberty'." (Govt. Br. 21.)

We are not aware of any decision of this Court which upholds such a view, and the Government cites

none.[5] It is, indeed, a rather large assumption which the Government makes, and we think it cannot withstand scrutiny. It may be supposed that no one would any longer deny that a man must be allowed to seek and hold a job in order to support himself and his family, for this is perhaps the most fundamental exercise of those rights of liberty and property which are protected by the Fifth Amendment. (*Truax v. Raich*, [1915] 239 U.S. 33, 39; *Allgeyer v. Louisana* [1897], 165 U.S. 578, 589; *Butchers' Union Co. v. Crescent City Co.* [1884], 111 U.S. 746, 762.) Nor, in a highly-industrialized society, can it be questioned that a labor union, whose formation is dictated by the necessity for collective pooling of their resources by working men, is but one of the numerous forms taken when people exercise the associational rights which the First Amendment guarantees. This Court has described these rights as "basic individual rights to work and to union membership." (*Aptheker v. Secretary of State* [1964], 378 U.S. 500, 512-513, n. 11.) The protected enjoyment of these rights neither permits the banning of membership in unions, nor warrants the intrusion of artificial distinctions between holding union membership and holding union office.

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[5]The statement in *American Communications Association v. Douds* (1950), 339 U.S. 382, 409, that "the loss of a particular position is not the loss of life or liberty", is patently a usage of the words in their ordinary meanings. It does not warrant a contention that engaging in union associations, whether as a member or officer, is not one of the constitutional "liberties" of the people. The Government does not, however, claim that the passage quoted above sustains the position it takes here.

Either a man has full freedom of association with his fellow workmen, or he has none; either they have full freedom of association with him, or they have none. To say that a man has the constitutional right to belong to a union, so that he may not be jailed for such membership, is all that is required to be said. Membership would be meaningless if it were nominal. Who can gainsay the fact that the exercise of membership rights in a union necessarily connotes the privilege of full engagement in all its activities, including participation in its elections and the exercise of the franchise?[6] If union membership is a constitutionally protected right, all the natural, normal and necessary attributes of that right are likewise protected. The several thousand members of Local 10 possessed a constitutionally protected right to nominate Archie Brown for office, to vote for him, to elect him, and to have him serve in that position. It is an indispensable corollary of that right that Brown should be entitled to permit his name to be placed in

[6]Of course, a union may adopt procedures for elections and impose qualifications for the holding of office, applying them equally and without discrimination. (See *Calhoon v. Harvey* [1964], 379 U.S. 134.) What Congress has now enacted, for union members, a bill of rights (73 Stat. 522, 29 U.S.C. 411), whose purpose is to encourage full and active participation by the rank and file in the affairs of the union, including its elections, reflects only a governmental intention to afford statutory protection to these rights of union members. (See *American Federation of Musicians v. Wittstein* [1964], 379 U.S. 171.) These rights, however, quite apart from statutory protection, are necessarily inherent in the mere fact of association, and find expression in the rules by which those associated together in a union provide for the democratic handling of their affairs. Note the testimony of Government witness Rohatch that Local 10 holds membership meetings twice each month, and is "a real rank and file union. We are not run by a few people, you know." (R. 69, 72.)

nomination, and to accept office upon his election to it. It would be absurd to argue that membership in a union is constitutionally protected, but various of its inseparable concomitants are not.[7]

It is not even clear from the Government's brief whether it actually concedes that mere membership in a union engaged in lawful pursuits is constitutionally protected. But this Court has held that it

> "cannot be seriously doubted that the First Amendment's guarantees of free speech, petition and assembly give railroad workers the right to gather together for the lawful purpose of helping and advising one another in asserting the rights Congress gave them in the Safety Appliance Act and in the Federal Employers Liability Act, statutory rights which would be vain and futile if the workers could not talk together freely as to the best course to follow. * * * The Brotherhood's activities fall just as clearly within the protection of the First Amendment. And the Constitution protects the associational rights of members of the union precisely as it does those of the NAACP." (*Brotherhood of Railroad Trainmen v. Virginia ex rel. Virginia State Bar* [1964], 377 U.S. 1, 5, 8.)

We assume, therefore, that the Government will admit that union membership is entitled to constitutional protection, and that the effort will be to distinguish

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[7]By a familiar line of cases, one may bring about his own disqualification from the right to hold office by being convicted of crime. Any person so affected has, of course, received a judicial trial on which the disqualification is founded. (See *DeVeau v. Braisted* [1960], 363 U.S. 144.) It is a different matter to ground disqualification upon the exercise of a First Amendment right.

between union membership and the holding of union office.

Such a distinction in the context of our times is, we submit, untenable and would produce incalculable harm. Figures readily available show that the organized labor movements of this country now embrace a total membership in excess of 15 millions. (1965 World Almanac, New York World-Telegram, N.Y., 1965, p. 759.) It should require no proof to establish that there are several hundred thousand persons engaged in the service of trade unions in capacities other than those which are merely clerical or custodial. Since it is only the latter who are excluded from the provisions of Section 504, it is plain that those affected by the Section are no mere handful.[8] All of them are restricted in the exercise of First Amendment rights, for the statute would equally punish those who should initiate Communist allegations for the first time tomorrow, with those who are presently Communists, or those who terminated their Communist affiliations less than five years before commencing union service. Are all these persons to be regarded as so different in status from union members that they possess no claim to constitutional protection against arbitrary action by government?

[8]It was recently reported by the United States Department of Labor that there are now more than 52,000 local trade union organizations in this country. (New York Times, Feb. 8, 1965, page 9, column 1.) Not all of them, perhaps not even many, have 35-member executive boards plus six elected officers, as is the case with Local 10. (R. 68.) Even if, however, they average a total of only 10 officers, trustees, business agents, and executive board members per union, the result is that well over half a million persons are covered by Section 504.

The issue is illumined for us by a consideration of the end-product to which acceptance of the Government's position would lead. Doubtless there are those in Congress, who, intent on combatting communism, would like, if it could be done, to enact legislation that would effectively deprive Communist Party members, and especially Communist Party officers, of their First Amendment rights, and to imprison them for any attempt to exercise such rights. Efforts to achieve this result are not unknown. (Smith Act, 62 Stat. 808, 18 USC 2385; Internal Security Act of 1950, 64 Stat. 987, 50 USC § 781 et seq.) Despite the widespread recognition, of which this Court has taken note (*Dennis v. United States* [1951], 341 U.S. 494; *Scales v. United States* [1961], 367 U.S. 203), that the views exposited by Communist leaders are anathema, partly for their content and partly for their allegedly alien origin, the Constitution has stood as a bulwark against any such blanket proscription. Can it be that a lesser regard is justifiable for the rights of those who are combined in trade unions, organizations whose birth and particular development are indigenous to our soil,[9] who contribute mightily to our national life, prosperity and achievements, and who discharge political responsibilities of the highest order?

It would be strange indeed if those who give leadership to trade unions in America were to receive, while discharging their official duties, less protection in the

[9] "Labour movements in America have arisen from peculiar American conditions, and it is by understanding these conditions that we shall be able to distinguish the movements and methods of organization from those of other countries • • •" (Commons and Associates, "History of Labour Movement in the United States", The Macmillan Company, N.Y. 1918, p. 3.)

exercise of their constitutional rights than those who merely elect such leaders—a distinction not drawn in reference to leaders and members of the Communist Party. It would be even more strange if an officer of a labor union were to be accorded less protection in the doing of his job, or to have a lesser right under the First Amendment to hold his job, than one who holds office in the Communist Party. No other conclusion is possible than that the union member who seeks office, and whose co-workers want him to serve in it, is entitled to accept it, and that he is protected under the First Amendment of the Constitution from having it claimed by government that this, and this alone, can be made a basis for criminal prosecution against him. Between this right of respondent Brown and the right of his fellow union members to choose him as an officer, no separation is possible.[10] For the nature of his right is such that, were it to be infringed, that very infringement would simultaneously and unavoidably also abridge First Amendment rights of each and every member of the union. "The right of members to consult with each other in a fraternal organization necessarily includes the right to select a spokesman from their number who could be expected to give the wisest counsel." (*Brotherhood of Railroad Trainmen v. Virginia ex rel. Virginia State Bar* [1964], 377 U.S. 1, 6.)

We conclude, then, that the right to hold union office carries with it at least as strong a claim to

[10]Seemingly, Congress was of this view, for 504 also provides, "No labor organization or officer thereof shall knowingly permit any person to assume or hold any office or paid position in violation of this subsection." The penalty may not exceed a fine of $10,000 or imprisonment for one year, or both. (504 b.)

constitutional protection from the exercise of Congressional power as the right to be an officer of the Communist Party. Neither the one nor the other may in and of itself be denounced as a crime, or made the basis for imposing criminal penalties.

C. The contemporaneous exercise of the foregoing rights is equally protected.

We proceed to the question whether the combined exercise of these rights by respondent somehow transforms their essential character so that there emerges from that fact a piece of "conduct" upon whose occurrence Congress may fasten criminal consequences. In short, what process of alchemy takes place to bring it about that First Amendment rights, which are protected when exercised by different individuals, forfeit their claim to protection when they are simultaneously exercised by the same individual?[11]

Essentially, the Government's argument comes down to this:

1. In the exercise of its power over interstate commerce, Congress may validly create, as it did in 9(h),[11a] a "regulation" applicable to the holding

[11] Actually, the statute is broader, for it punishes the holding of union office by anyone who, though not a Communist Party member, did belong to the Party at some time less than 5 years ago. We discuss this aspect of the case in a later section of our brief, noting here only that the statute applies even in the absence of contemporaneously combining union office and party membership.

[11a] This section (29 U.S.C. 159(h)) was adopted in 1947, and its constitutionality was upheld in *American Communications Association v. Douds*, 339 U.S. 332. It did not punish or prohibit the holding of union office by a Communist Party member. It did, however, deny access to facilities of the National Labor Relations Board to any union whose officers failed to file affidavits stating they were not currently members of the Communist Party or affiliated therewith. The affidavit requirement did not apply to members of executive boards, trustees, and the like. The section was repealed in 1959, being replaced by Section 504.

of union office even though First Amendment rights of Communists are thereby abridged. (Govt. Br. 8, 13, 15-17, citing *Douds*.) Since 504 is the Congressional choice to succeed 9(h), it too must be treated as a "regulation" within the scope of approval obtained from this Court in *Douds*. (Govt. Br. 11, 36-40.)

2. Congress has power to invoke criminal sanctions in the regulation of "conduct" consisting of the contemporaneous holding of "positions" which give "rise to a conflict (or conflicts) of interest". (Govt. Br. 23, 47, citing *Board of Governors v. Agnew* [1947], 329 U.S. 441.) The simultaneous holding of union office and Communist Party membership is "conduct" which creates "conflicts of interest". (Govt. Br. 45.)

3. It follows that 504, while appearing to be criminal in form, is but a permissible way to regulate conduct that gives rise to conflicts of interest, and any impact on First Amendment rights is too incidental to evoke this Court's concern. (Govt. Br. 23.)

The trouble with this syllogism is that it claims for *Douds* determinations which that case never made, it misapplies the reasoning and holding in *Agnew*, and it distorts the English language assigning to the word "conduct" a meaning never found, so far as we can ascertain, in any decision of this Court.

(1) Board of Governors v. Agnew (1947), 329 U.S. 441, is not relevant.

We may quickly dispose of the contention that the doctrine of "conflict of interest" assertedly enunciated

in *Board of Governors v. Agnew* (1947), 329 U.S. 441, is relevant here; indeed, the Government's brief carefully avoids any real effort to show that it is. (Govt. Br. 23, 45.) In *Agnew*, this Court upheld legislation investing the Comptroller of the Currency with authority to compel a bank director to discontinue in that office if he also was a partner or employee in a firm primarily engaged in the business of underwriting securities. (Banking Act of 1933, 48 Stat. 162, 49 Stat. 704, 12 USCA §§ 77, 78.) It was stated that Congress could legitimately anticipate the possibility that a director might "use his influence in the bank to involve it or its customers in securities which his underwriting house has in its portfolio or has committed itself to take" (at 447). To eliminate "tempting opportunities" for dereliction in duty or breach of fiduciary obligation to the bank, Congress could, this Court decided, adopt "a preventive or prophylactic measure" (at 449). Enforcement of the statute required the Comptroller, in the first instance, to warn the individual to discontinue conduct claimed to be a violation of the law; upon his ignoring the warning, that fact was to be certified to the Board of Governors of the Federal Reserve System; thereupon the Board had power to notify the individual to appear at a hearing, to hold a hearing, to provide opportunity for the individual to be heard, and thereafter to order his removal from office. If, after a removal order, the individual persisted in participating in management of the bank, he then became subject to criminal prosecution.

It is at once apparent that *Agnew* is wholly inapposite here, and that the Court of Appeals rightly said that "loss of position by virtue of Communist Party membership is not to be confused with the usual conflict-of-interest situation. . . ." (R. 257; 334 F. 2d 488 at 494.) Whatever may be the extent to which protection attaches to engaging in the securities business, or to holding office in a national bank whose very existence stems from a charter granted by authority of the Congress,[12] it has never been suggested that the right to engage in either of these activities is comprehended within the provisions of the First Amendment. The "conduct" involved in serving as a bank director, while also engaging in the sale of securities, doubtless necessitates the utilization of various media of communication, but this scarcely justifies a comparison with the exercise of rights of a political nature.[13]

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[12]As it is with political parties, so it is with labor unions: their formation, existence and operation, whether local or national, are not dependent on Congressional sanction. The existence of trade unions in the United States antedates the first session in 1789 of the Congress itself. An organization of cartmen in New York engaged in a strike in 1677; the bakers of New York called a strike in 1741; organization of carpenters "so that the workmen should have a fair recompense for their labour" occurred in Philadelphia in 1724; and a Central Labour Council called "The General Society of the Mechanics and Tradesmen" of New York, in which 30 trades were represented, existed in 1786. (Commons and Associates, "History of Labour in the United States", The Macmillan Company, N.Y. 1918, pp. 25, 68, 72.)

[13]In a long line of decisions (see p. 14, fn. 4) this Court has attested to "the preferred place given in our scheme to the great, the indispensable democratic freedoms secured by the First Amendment". (*Thomas v. Collins* [1945], 323 U.S. 516 at 530.) The constitutional protection thus guaranteed extends to "expression and association without regard to the race, creed or political or religious affiliation of the members of the group which invokes its shield, or to the truth, popularity or social utility of the ideas and beliefs which are offered". (*NAACP v. Button* [1963], 371 U.S. 415 at 444-445.)

Political expression to achieve legitimate political ends through orderly group activity is precisely what occurs when men "engage in association for the advancement of beliefs and ideas". (*NAACP v. Alabama, ex rel. Patterson* [1958], 337 U.S. 449 at 460.) Those so associated are not the less protected by the Constitution because theirs is "not a conventional political party" (*NAACP v. Button* [1963], 371 U.S. 415 at 431), or because it is "the associational rights of the members of the union" which are involved (*Brotherhood of Railroad Trainmen v. Virginia* [1964], 337 U.S. 1 at 5.) *Agnew*, then, is not a case in which First Amendment rights were urged, considered, or even thought to be present.[14]

It is not amiss, either, to point out that even though Congress was not dealing with First Amendment rights in the statute considered in *Agnew*, it proceeded far more cautiously with the imposition of criminal sanctions than it did in Section 504. Congress did indeed "regulate" banking there, in the manner which has become familiar in numerous fields where Congressional power is exercised—by providing for the issuance, in effect, of an order to show cause, a requirement that the person to be affected must be accorded a hearing and an opportunity to defend, and presumably a chance to persuade the hearing tribunal that no adverse order should be issued against him. Only in the event he lost at the conclusion of the administrative hearing, and only if he thereafter per-

[14]Neither was any contention advanced that the Fifth Amendment, or for that matter any constitutional provision, was involved.

sisted in defying the administrative order, did the statute subject him to a criminal charge. Even then, this Court agreed that he had the right to obtain judicial review (though the statute did not provide for it), and the district Court had power, by enjoining the removal order, effectively to prevent criminal prosecution for his disobedience of it. (329 U.S. at 444.) It is, then, nothing short of distortion for the Government to say, however politely it does so, that the statute in *Agnew*, "even though" the criminal aspects do not "take effect until the removal order is disobeyed", nevertheless provides "a criminal sanction against the offending individual's retention of such dual capacity *just as Section 504 does* * * *". (Govt. Br. 23, emphasis ours.)

In sum, *Agnew* provides not the slightest support for either of the two propositions which underlie the Government's contention here: that (1) criminal prosecution and penalty may be founded upon (2) the mere exercise of First Amendment rights.

(2) American Communications Association v. Douds (1950), 339 U.S. 382, is not controlling.

Compelled, as it is, to rest solely on *American Communications Association v. Douds* (1950), 339 U.S. 382, the Government seeks to assign to that case a holding not warranted by what the case itself states or decides. Once more there is resort, as we now show, to a misreading of this Court' opinion.

The gist of the Government's argument is that we are not dealing with a criminal statute at all, but only with a regulation. Congress, it is said, has power over

interstate commerce, and 504 is but a regulation adopted in the exercise of that power. The fact that a man may go to jail for violating the so-called regulation does not, we are told, make this a criminal case, for Congress is using imprisonment because "it merely carries into effect the purpose of the statute". (Govt. Br. 46.) A previous regulatory provision, Section 9(h), was upheld by this Court in *Douds, supra,* but inasmuch as it has been found in practice to be unsatisfactory, Congress has turned to the present statute as a substitute. (Govt. Br. 7.) We are reminded that it is for Congress, not this Court, to select the kind of regulation it desires, without limitation on its discretion. (Govt. Br. 15, 30.) We are told that Congress has exercised an informed judgment because it took "evidence" which justifies its determination. (Govt. Br. 26-27.) Section 504, then, is merely the legitimate offspring of Section 9(h). Inasmuch as this Court had previously upheld Section 9(h), why should Congress be powerless to adopt a substitute, especially when the decision to inter 9(h) was based upon reasons which were unanswerably cogent.

With the reasons assigned for repealing 9(h) we have no quarrel, for the iniquitous nature of that section is amply demonstrated by the impressive array of facts and arguments directed against it in the Government's brief. (Govt. Br. 30-36.) Most of the items recited in this melancholy catalogue of concededly "inequitable results" (Govt. Br. 40) produced by Section 9(h), could easily have been foreseen. Some of them were foreseen, along with other and

graver faults, by the one Justice remaining on this Court who participated in the consideration of that case. In the dissenting opinion of Mr. Justice Black, the affinity existing between Section 9(h) and its ancient predecessors is definitively shown, and the foul and evil consequences of such oppressive legislation are confirmed from the pages of history. Pointing out that this Court had never before "held that the Government could for any reason attaint persons for their political beliefs or affiliations", the dissent exposes the insubstantiality of the contention that constitutionally protected rights may be abridged by virtue of "a satisfactory legislative reason". (339 U.S. at 449.) Evaluating the main opinion's "assurance that we need not fear too much legislative restriction of political belief or association 'while this Court sits' " (*ibid.*, 449), the dissent forewarned that "restrictions imposed on proscribed groups are seldom static" (*ibid.*, 449), and anticipated the danger of future efforts at expansion of the statute. That prediction is vindicated by the enactment of Section 504 (which substitutes imprisonment for denial of access to Labor Board facilities), and the effort to justify it here as "nothing more than another federal regulation against conduct" (Govt. Br. 23), enlarged though it be in its application from those who were said in 1950 to occupy "a position of great power over the economy of the country" (339 U.S. at 404), "have the will and power" to call political strikes "without advocacy or persuasion" (*ibid.*, 396), and "would employ [unions] to serve the political ends of a foreign power which seeks to achieve world-wide

domination" (Govt. Br. 19), to those today who possess no such power (infra, p. 41) and against whom the charge is solely "Communist Party membership, regardless of the particular member's activity or commitment", and irrespective of "active and knowing participation" in any criminal enterprise. (Govt. Br. 22.)

The plain fact of the matter is that 504 is neither a "regulation" nor does it govern "conduct." It is a criminal penalty and nothing less. It forbids the exercise of First Amendment rights as such. There is no requirement that the individual punished shall have engaged in any conduct at all. He is punished for the mere assertion of his rights, without more. It could not more clearly be a penal statute proscribing First Amendment rights than if it had been enacted as a section of the Criminal Code and given the title "Crimes, By Those Possessing First Amendment Rights, For Exercising First Amendment Rights".

Needless to say, the fact that 504 is to be found in a statute which, in other respects, imposes regulations relating to commerce, does not change the character of the section itself. Though a law "appears to be a regulation", this Court has said that

> "surely form cannot provide the answer to this inquiry. A statute providing that 'a person shall lose his liberty by committing bank robbery,' though in form a regulation of liberty, would nonetheless be penal. Nor would its penal effect be altered by labeling it a regulation of banks or by arguing that there is a rational connection between safeguarding banks and imprisoning

bank robbers. The inquiry must be directed to substance". (*Trop v. Dulles* [1958], 356 U.S. 86, 95.)

And a law

"that prescribes the consequence that will befall one who fails to abide by these regulatory provisions is a penal law. Plainly, legislation prescribing imprisonment for the crime of desertion is penal in nature. If loss of citizenship is substituted for imprisonment, it cannot fairly be said that the use of this particular sanction transforms the fundamental nature of the statute." (*Trop v. Dulles, supra,* at 97.)

Thus, "labeling it a regulation" does not make it so. Section 504 is a penal statute providing for indictment, arraignment, and trial in a Court of criminal justice. No conceivable enactment could less qualify as mere regulation.

It is the same with the other "element of the offense". (Govt. Br. 47.) Speech is speech, not conduct; and speech plus speech remains speech, and labeling it conduct does not make it conduct. First Amendment freedoms are not shorn of constitutional protection because their exercise is called "solicitation". (*NAACP v. Button* [1963], 371 U.S. 415, 429-430.) This Court has said that "a statute cannot foreclose the exercise of constitutional rights by mere labels" (*ibid.*, 427.) In asserting his rights of speech, a person is not limited to abstract discussion, for "the First Amendment also protects vigorous advocacy, certainly of lawful ends, against governmental intrusion" (*ibid.*, 429.) And the fact that speech, to be

effective, is exercised "in association" with others, and consists of performing services such as "the efforts of a union official to organize workers", cannot form the basis for infringement of these "privileged" rights under the First Amendment. (*NAACP v. Alabama, ex rel. Patterson* [1958], 357 U.S. 449, 460; *Thomas v. Collins* [1945], 323 U.S. 516, 530.) Of course it is true, as Texas urged, that "something more is done by a labor organizer than talking." (*Thomas v. Collins, supra,* at 526.) Of course it is true, as Virginia contended, that the NAACP not only talks, but provides a medium (organization) and a mode (resort to litigation) to enable its members to exercise their rights of expression in association with each other, and thus enhance their hopes of success. (*NAACP v. Button* [1963], 371 U.S. 415, 432.) But the fact that speech takes these active forms does not undo its claim to constitutional protection as speech, for it is not to be subsumed "under a narrow, literal conception of freedom of speech, petition or assembly." (*NAACP v. Button, supra,* at 430.) It is a right that "was enshrined in the First Amendment of the Bill of Rights" (*Sweezy v. New Hampshire* [1957], 354 U.S. 234, 250) of which we speak; a right which is "supremely precious in our society", and whose preservation requires "breathing space to survive". (*NAACP v. Button, supra,* at 433.) There is neither room nor reason for caviling.

> "The right of peaceable assembly is a right cognate to those of free speech and free press and is equally fundamental"; those who assemble together "for lawful discussion" and "peaceable

> political action * * * cannot be branded as criminals on that score"; the "legislative intervention can find constitutional justification only by dealing with the abuse. The rights themselves must not be curtailed." (*DeJonge v. Oregon* [1937], 299 U.S. 353, 364, 365.)

If, then, as this Court has repeatedly demonstrated, it will not permit the abridgement of First Amendment rights to be accomplished by any technique of mislabeling them, what can there be in the present statute, or in the record of this case, to justify the Government in claiming that we deal here with "conduct intertwined with expression and association"? (Govt. Br. 16, 45, citing *Cox v. Louisiana,* No. 49 this Term.) In *Cox,* this Court dealt with

> "a precise, narrowly drawn regulatory statute which prohibits certain specific behavior. It prohibits a particular type of conduct, namely, picketing and parading, in a few specified locations, in or near court houses".

The behavior which the statute forbade was held to be subject to regulation "even though intertwined with expression and association".

It was a statute prohibiting the picketing of a court house, of which this Court used the phrase "conduct intertwined with expression and association". What possible analogy is there between the behavior of one who leads 2000 persons to picket a court house, and the act of a man who, while holding Communist membership, participates in an orderly, private meeting of his union's executive board?

Where is the comparison? Is it perhaps Brown's mere statement, "I second the motion," that makes him a sufficiently "active" board member to transform speech into "conduct"? Doesn't it matter what the motion was that he seconded? Or what else he said at the meeting? And what he said at every later meeting? And with what purpose he served his union? If not, as the government claims, then it would require us to be deaf, dumb, and blind to the simplest facts of life to affirm that Brown's attendance at the meeting is so substantially the same as leading a group of pickets who interfere with judicial proceedings by parading near a court house, that both constitute similar "conduct" and call for an application of the same standards of constitutionality to the different statutes and situations involved.

In fairness, it must be admitted that the Government is more restrictive in defining the offense than would appear from the discussion above. The crime, it is said, was complete when he took office in the union—"* * * the offense in this case was committed when respondent combined his Communist Party membership 'with occupancy of a position of great power over the economy of the country'". (Govt. Br. 45.)[15] For this reason, we are told, the case "* * * involves a restraint, primarily upon conduct, not upon speech or advocacy". (Govt. Br. 45.) Brown's

[15]This bland assumption is utterly at variance with the facts, else the Government would not have been so insistent on keeping from the jury evidence that neither Brown nor Local 10, nor the combination of both, possessed the slightest semblance of power over the economy. (R. 75-79.)

guilt arose from the fact that he was not deterred from "combining positions which create 'tempting opportunities' * * * to perform acts inconsistent with the national labor policy. At most, it is a regulation of 'conduct * * * intertwined with expression and association' * * * and thus distinguishable from regulations of speech as such". (Govt. Br. 45.)

But so devoid of reason is this contention that minute one seeks to elaborate a rational explanation for it, all internal consistency vanishes. This is why the Government finds itself slipping into a discussion of quite a different kind of "conduct" when it puts forward the factual bases which are said to entitle the statute to be judged, not by speech standards, but by the lesser standards relating to "conduct". Thus we find the Government saying that the statute's "primary concern is conduct—serving in union offices—which, if committed by individuals responsive to the directions of a foreign-dominated power, presents a grave threat to our national economy". (Govt. Br. 8.) The whole thrust of the argument based upon the legislative history is that the concern of Congress is with preventing the calling of political strikes. (Govt. Br. 11, 15.) "In other words, Section 504 is a prophylactic measure directed at preventing future conduct, not at punishing past speech or deterring prospective association". (Govt. Br. 16.)

It would appear, then, that there is no apprehension that the mere election of Brown to union office, and his commencement of service on the executive board, might be taken as a signal for an armed up-

rising, or for his fellow workmen to plunge the San Francisco waterfront into political strife. The "conduct" which Congress is said to fear, against which the legislation is essentially directed, is something additional to and different from Brown's election to office; it is not of the present tense, but of the future; it is not something happening now, but something that possibly may occur at some indefinite and unforeseen future date—and, of course, may never occur at all. It is the mere possibility of its occurrence which Congress, we are told, had the right to evaluate and which justifies the enactment of 504. And this Court is assured that the standards by which Brown is to be judged are "objective and readily-determined criteria". (Govt. Br. 47.) That the acceptance of this proposition means that it would never be possible for Brown to prove his innocence of either culpable conduct or intention to do anything warranting imprisonment, is to the Government of no slightest consequence.

It would be reasonable to expect that a statute so utterly unprecedented as 504 would result, in any effort to justify it, in a patently strained interpretation of any decision of this Court which is said to support it. This is precisely what the Government has found it necessary to do with the decision in *Douds* in order to make it appear that 504 is within the scope of approval given to 9(h). A careful examination of the Court's opinion reveals that the very reasons assigned to justify 9(h) are themselves inconsistent with the position which is taken to support 504. These may be summarized as follows:

(1) Important to the holding in *Douds* was that 9(h) did not "specifically forbid persons who had not signed the affidavit from holding positions of union leadership nor require their discharge from office". (339 U.S. at 390.) Here, of course, the prohibition against the holding of union office is absolute and unqualified.

(2) To the extent that First Amendment rights were invaded by 9(h), it was said that the statute resulted only "in an indirect, conditional, partial abridgement of speech" (at 399). Here, the abridgement is direct; it applies unconditionally; it is complete, not partial.

(3) *Douds* expressly attached the greatest importance to the fact that 9(h) "does not prevent or punish by criminal sanctions the making of a speech, the affiliation with any organization, or the holding of any belief" (at 402). Here, affiliation with the Communist Party is expressly made "one element of the offense" (Govt. Br. 47), and despite the tortured effort to make 504 out as something different from a criminal statute (Govt. Br. 44-45), it cannot be regarded as anything else.

(4) Heavy stress was laid in *Douds* on the fact that 9(h)

> "touches only a relative handful of persons, leaving the great majority of persons of the identified affiliations and beliefs completely free from restraint. And it leaves those few who are affected free to maintain their affiliations and beliefs subject only to possible loss of positions * * *" (at 404).

Here, however, the loss is not "possible", but commanded, and those affected, as we have shown, are not merely a relative handful of persons, but all who belong to the Party. Moreover, the very reason for justifying the lesser restraint exerted by 9(h) on even the "handful", was based in *Douds* on their supposed occupancy of positions of great power over the economy—an argument which cannot feasibly be advanced here.

(5) To meet the argument asserted in the dissenting opinion that 9(h) was a forbidden bill of attainder, the distinction drawn in *Douds* was said to be

> "* * * emphasized by the fact that members of those groups identified in 9(h) are free to serve as union officers if at any time they renounce the allegiances which constituted a bar to signing the affidavit in the past. Past conduct, actual or threatened by their previous adherence to affiliations and beliefs mentioned in 9(h), is not a bar to resumption of the position. In the cases relied upon by the unions on the other hand, this Court has emphasized that, since the basis of disqualification was past action or loyalty, nothing that those persons proscribed by its terms could ever do would change the result [citations]. Here the intention is to forestall future dangerous acts; there is no one who may not by a voluntary alteration of the loyalties which impel him to action, become eligible to sign the affidavit." (at 414.)

The passage above quoted needs no analysis to demonstrate that its underlying premises are inconsistent with the position which the Government must needs take here.

Though we argue later that *Douds* should be expressly overruled, the foregoing analysis makes plain that the Court of Appeals was right; that *Douds* is not controlling here, and does not support, let alone require, the affirmance of respondent's criminal conviction.

II

SECTION 504 ON ITS FACE AND AS APPLIED HERE DEPRIVES RESPONDENT OF LIBERTY WITHOUT DUE PROCESS OF LAW, CONTRARY TO THE COMMAND OF THE FIFTH AMENDMENT.

A. Ignored are all factors of intent or ability to bring about an evil.

We have urged that the question of Brown's guilt cannot, consistent with applicable constitutional provisions, be decided on a record which excludes evidence of his purpose in accepting union office, evidence of his conduct therein, evidence of the reasonable possibility that he or the local board or the combination of both of them possessed power to cause injury to commerce, and evidence of his own intent. In no other way can it be determined whether Brown, who suffers personally the consequences of a guilty verdict, has in fact done anything to merit punishment.

Nothing better illustrates the tenuous basis upon which the statute rests, and the nebulous character of the Government's defense of it, than a comparison between the known facts here and the suppositions upon which the Government's case must

rest. No claim is made that Brown, or the union on whose board he served, has ever interfered, or advocated interfering, with our channels of commerce at any time during the past 15 years. It was, in fact, the Government that objected to any proofs being received by the jury on this subject, for these proofs would have fully demonstrated that this union, its members and its officers, Brown among them, had established a record of such harmonious relations with employers in the solution of economic problems that both City and State paid them honor for it. (Def. Ex. D; R. 111, 194; Def. Ex. E; R. 112, 195.) This evidence, which was kept from the jury, is supposed also to be ignored by this Court, while in its place the Government sets out a list of references to what other persons and other unions are said to have done at other times and places in the past. (Govt. Br. 24-27.) There is even a certain degree of temerity to be found in the reproduction for this Court's consideration of hearsay references taken from so-called reports compiled by the publicity department of the CIO in 1954, relating to the expulsion of this union in 1949 from the CIO. (Govt. Br. 27-28.)[16]

But conviction for crime is conviction for personal misconduct, and under our system of law it cannot

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[16]More apropos would have been a reference to *International Longshoremen's and Warehousemen's Union (American Mail Line* Ltd.) (1963), 144 NLRB 1432, 1442, where it was said that the "concord between respondents and Pacific Maritime Association has been widely acclaimed as a history-making precedent, a peaceful settlement of a problem which has troubled the west coast waterfront for a number of years."

be otherwise. The Smith Act (54 Stat. 670, 18 USC 2385), was saved from constitutional condemnation only because this Court was able to construe it as requiring

> "as an essential element of the crime proof of intent of those who are charged with its violation to overthrow the Government by force and violence." (*Dennis v. United States* [1951], 341 U.S. 494, 499).

See also *Scales v. United States* (1961), 367 U.S. 203, 226-227. And in *Yates v. United States* (1957), 354 U.S. 298, it was held that this "requisite specific intent" could not be deemed proved by a showing of "mere membership or the holding of office in the Party" (354 U.S. at 331). See also *Noto v. United States* (1961), 367 U.S. 290, 297-298.

Accordingly it is clear that seeking to attach personal criminality to mere political associations or membership in political organizations must fail; proof of the defendant's personal intent to bring about a substantive evil is an indispensable requisite of conviction. Arguing, as it does, that 504 neither requires nor permits proof that the accused intends, or has ability, to commit any act designed to achieve the forbidden object of causing political strikes (Govt. Br. 15-16, 22, 46), the Government cannot but concede that if the aforementioned decisions of this Court are applicable here, Section 504 must be declared to be, as the Court of Appeals declared it to be, unconstitutional on its face. Compare *Aptheker v. Secretary of State* (1964), 378 U.S. 500.

B. An irrebuttable presumption of guilt is drawn from the exercise of a constitutionally protected right.

But more basically, what emerges from an analysis of the Government's position here is that Congress need not really be interested in whether the respondent Brown, or the union of which he was a board member, or the combination of both, ever in fact constituted a threat to the country or to interstate commerce, or have given reason to suppose that they might at a future date. All that is needed, in the view of the Government, is that Congress shall have established what amounts to a conclusive presumption against the respondent by virtue of his political affiliations. The result of such a procedure is to transfer the criminal trial against Brown to the halls of Congress, to try him in absentia, upon evidence wholly unrelated to him, and then to adopt a law enabling the Government to prosecute him in San Francisco, with what amounts to a built-in verdict of guilty written into the statute itself; in effect, due process in reverse.[17]

Even in cases where the force exerted by Government against the individual is not penal in the crimi-

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[17] "'Let the jury consider their verdict,' the King said, for about the twentieth time that day.

'No, no!' said the Queen. 'Sentence first—verdict afterwards.'

'Stuff and nonsense!' said Alice loudly. 'The idea of having the sentence first!'

'Hold your tongue!' said the Queen, turning purple.

'I won't!' said Alice.

'Off with her head!' the Queen shouted at the top of her voice." (Lewis Carroll, "Alice In Wonderland", Peter Pauper Press, Mount Vernon, pp. 157-158.)

nal sense, but rather takes the form of imposing a civil disability, this Court has not permitted Congress to avoid constitutional restraints by such arguments as are advanced here. In this Court's decision in *Aptheker v. Secretary of State* (1964), 378 U.S. 500, that portion of the Subversive Activities Control Act which prohibits the issuance of passports to Communists was held invalid because it established "an irrebuttable presumption that individuals who are members of the subversive organizations will, if given passports, engage in activities inimical to the security of the United States". (378 U.S. at 511.) Though it was dealing with a non-criminal case, this Court directed attention to views expressed to Congress in 1950 by the Assistant to the Attorney General of the United States, Peyton Ford, whose opposition to a bill then being considered was stated in these terms:

> "A world of difference exists from the standpoint of sound policy and constitutional validity between making * * * membership in an organization * * * a felony and recognizing such membership * * * as merely one piece of evidence pointing to possible disloyalty. The bill would brand the member of an illicit organization a felon, no matter how innocent his membership * * *. It does not appear, therefore, necessary even if constitutionally possible to add * * * a penal statute such as proposed in the bill * * * [I]t is the duty of the Attorney General to protect the rights of individuals guaranteed by the Constitution as well as to protect the government from subversion." (Hearings on HR 3903 and HR 7595 before the House Committee on Un-

American Activities, 81st Cong. 2nd Session, 2125.)

This Court recently held, in construing legislation relating to the illegal operation of a still, that "unexplained presence at the site of the criminal enterprise" could provide a reasonable basis for inferring guilt of the substantive offense. (*United States v. Gainey,* this Term, No. 13, decided March 1, 1965.) In reply to strong dissents attacking the legislation for invading guarantees of the Fifth and Sixth Amendments, the Court relied upon the fact that

> "the statutory inference was not conclusive. 'Presence' was one circumstance to be considered among many. Even if they found that the defendant had been present at the still, and that his presence remained unexplained, the jury could nevertheless acquit him if they found that the Government had not proved his guilt beyond a reasonable doubt".

But in our case, the effect of the statute is to enforce a presumption that is conclusive; opportunity to the defendant to "explain his presence" at the meeting of the board is not afforded, and the jury is not alowed to hear any explanation which might lead to acquittal, nor is it told that he may be acquitted even in the absence of such explanation. The statute is drawn to brook no explanation and to allow no acquittal. Thus the Government contends here for a rule denying, to a person exercising First Amendment rights, those basic safeguards which this Court would not deny to one charged with the illicit operation of a still.

III

SECTION 504 "SWEEPS TOO WIDELY AND INDISCRIMINATELY ACROSS LIBERTIES GUARANTEED" BY THE FIRST AMENDMENT. (APTHEKER v. UNITED STATES [1964], 378 U.S. 500.)

Our discussion thus far has demonstrated the numerous respects in which the statute offends the provisions of the First Amendment. Many of the impermissible inroads made upon the respondent's rights of speech, press and association also effect substantial abridgements of rights guaranteed to him by the Fifth Amendment. We have shown that guilt is imputed and punishment is imposed despite the absence of criminal intent, or of any ability, on the part of respondent to bring about any substantive evil; and that the operation of the statute is such that his guilt is essentially presumed from so-called evidence never adduced at any trial at which he has an opportunity to meet it. Yet even these fundamental defects of the statute do not, as we now show, exhaust the aspects in which it is constitutionally vulnerable.

The statute suffers from the vice that, in order to insure against the calling of political strikes, it not only sweeps within its ambit hundreds of thousands of trade unionists,[18] but it does so by means "that particularly stifle personal liberties when the [same] end can be more narrowly achieved". (*Shelton v. Tucker* [1960], 364 U.S. 479, 488.) Such overbreadth, especially in statutes trenching upon First Amendment freedoms, has occasioned pointed comment from this Court in the recent past. (*Aptheker v. Secretary of*

[18]See page 20, fn. 8, *supra*.

State [1964], 378 U.S. 500, 516; *NAACP v. Button* [1963], 371 U.S. 415, 432-433. See also *Cantwell v. Connecticut* [1940], 310 U.S. 306, 310; *Carlson v. California* [1940], 310 U.S. 196, 112.)

Assuming that Congress' power to regulate interstate commerce can be said to permit some control over the exercise by trade union members of their associational rights, it can scarcely be denied that methods less drastic than 504 are available. A statute more narrowly drawn could make political strikes (as Congress has made jurisdictional or secondary boycott strikes [61 Stat. 140, 29 USCA 158(b)(4)(B) and (D)] unfair labor practices, or subject such strikes to injunction proceedings as Congress has done in connection with "national emergency" strikes [61 Stat. 155, 29 USCA 178]).

Congress has also known how to attack the "problem" of Communists in trade unions by legislation which more carefully focuses on the "evil" than does Section 504. Thus a labor organization which is found after a hearing to be "communist infiltrated" is deprived of its right to function as such under the National Labor Relations Act (Communist Control Act of 1954, 68 Stat. 775, 778, 50 USC 792[g] et seq.) and members of "Communist organizations" are denied the right to hold office in or be employed by a trade union. (*ibid.*, 68 Stat. at 777, 50 USC 784[a][1][E].) Indeed, Congress has precluded the members of an organization which has been found to be a "Communist action" organization, from employment in "defense" facilities. (*ibid.*, 50 USC 784 [a][1][D].) Whatever

may be said of the constitutionality of these provisions on other grounds, it is clear that this legislation is not subject to the charge, applicable here, that Congress has acted in utter disregard of the existence of alternative and far less drastic means to achieve its purpose. The destruction of First Amendment rights which follows from the imposition of a criminal penalty for the mere temporal conjunction of local executive board service with Communist Party membership, would be a costly price to pay merely to achieve a result which the Government itself claims could be reached through the use of lesser coercions (Govt. Br. p. 44).

The statute is not saved from the charge of overbreadth merely because it names "members of the Communist Party itself" as those covered, rather than members of "a Communist-action group" (Govt. Br. 21), and the effort of the Government to distinguish on that ground the decision of this Court in *Aptheker v. Secretary of State* (1964), 378 U.S. 500 lacks force. It is true that the technique customarily employed in legislation by which Congress seeks to restrict Communists, is to describe the persons to be affected as "members of an organization", of which a particular characteristic is stated, i.e. an organization that "advocates the overthrow of the government by force and violence" (Smith Act, 54 Stat. 670, 18 USC 2385), or one concerning which "there is in effect a final order of the Board requiring such organization to register" (Subversive Activities Control Act of 1950, 64 Stat. 987, 50 USC 781 et seq.). But the de-

cision of Congress to employ in 504 the technique of specifying members of the Communist Party as such, does not make this a narrowly-drawn statute "more discriminately tailored to the constitutional liberties of individuals" (Govt. Br. 21), since, contrary to the Government's argument, no "major differences of scope" (Govt. Br. 21) were intended or created. The different technique used here serves only to abbreviate the definition of the class of persons against whom all this legislation is directed, and that class remains, as it was intended to remain, precisely the same. The Government's brief, with its repeated emphasis on the purpose of Congress to exclude from union office all "adherents to the Communist Party and believers in the unconstitutional overthrow of our government" (Govt. Br. 14), scarcely lends support to the effort to differentiate between the body of persons affected by 504 and those whom Congress sought to reach, in other contexts, by legislation employing the alternative method of describing them.

Neither is there any merit to the effort to distinguish *Aptheker* upon the ground that there the right prohibited was a constitutionally protected "liberty", whereas here there is none. We have shown in our earlier discussion that the right to serve in a union office to which one is elected cannot rationally be treated as separable from what this Court has called "basic individual rights to work and to union membership" (*Aptheker v. Secretary of State, supra*, at 573, n. 11). It is an integral concomitant of the membership's "right to select a spokesman from their

number". (*Brotherhood of Railroad Trainmen v. Virginia ex rel. Virginia State Bar*, 377, US 1, 6.) To the extent that any difference exists between the rights of Brown and his fellow unionists to have him act in a representative capacity for them, and the right of Aptheker to travel in Europe and Asia, it would seem self-evident that in foreclosing the former, 504 is less "discriminately tailored to the constitutional liberties of individuals" than the passport restrictions considered in *Aptheker*, and its effect, on larger numbers of people, is more devastating.

Additionally, there is a vast difference between the methods employed in the two statutes to achieve the Congressional purpose. Here, it is at once made a criminal offense for Brown to occupy union office, without opportunity to exculpate himself from the suspicion or fear that he might commit some intolerable abuse of the privileges of occupying that office. In *Aptheker*, the statute not only did not impose criminal punishment ab initio, but it afforded the passport applicant a full administrative hearing in which to support his rights by producing relevant evidence personal to him. The Government's argument that, notwithstanding, 504 is defensible because "there is no similar administrative process whereby candidates for union office are evaluated and their qualifications approved" (Govt. Br. 22), is not an argument for upholding 504. It is at most only an argument that Congress could and should resort to similar administrative process with respect to union officers. Certainly the argument does not justify approval of this

statute which requires that Brown shall surrender one constitutionally protected right in order to enjoy another. A similar contention was also advanced in *Aptheker,* and this Court said,

> "Since freedom of association is itself guaranteed in the First Amendment, restrictions imposed upon the right to travel cannot be dismissed by asserting that the right to travel could be fully exercised if the individual would first yield up his membership in a given association". (378 US at 507.)

IV

SECTION 504 IS BOTH A BILL OF ATTAINDER AND AN EX POST FACTO LAW.

The Government, in effect, asks this Court to disregard the retrospective features of Section 504, saying that different questions would be presented, "of course", in a case involving a person whose resignation from the Party had occurred within 5 years of election to union office. (Govt. Br. 11, n. 2.) But we think there are strong grounds for a different view. In the first place, no reason is offered to justify a departure in this case from the Court's long established practice,

> ". . . in appraising a statute's inhibitory effect upon such [First Amendment] rights, . . . to take into account possible applications of the statute in other factual contexts besides that at bar. *Thornhill v. Alabama,* 310 US 88, 97, 98; *Winters v. New York, supra* (333 US at 518-520)." (*NAACP v. Button* [1963], 371 U.S. 415, 432.)

Clearly, the inhibitory impact of this statute upon the thousands of trade union officers to whom it applies ought not to be ignored.

In the second place, the retrospective sweep of the statute reaches even to this respondent. At no time between 1959, when the statute was enacted, and 1964 when the five-year period could have expired at its earliest, could Brown, by any "voluntary alteration of [his] loyalties" (*American Communications Association v. Douds* [1950], 339 U.S. 382, 414) or otherwise, have held union office without liability to criminal prosecution. Nor could he even now by such an alteration become eligible to hold union office for five more years.

Apart from the fact, as we later show, that nothing in the legislative history cited by the Government supports the arbitrary selection of a five-year period, the conditioning of the exercise of constitutional rights upon past behavior renders this statute invalid as an ex post facto law prohibited by Article I, Section 9, Clause 3 of the Federal Constitution. No more than could the minister in *Cummings v. Missouri* (1867), 4 Wall (71 U.S.) 277, or the lawyer in *Ex parte Garland* (1867) 4 Wall (71 U.S,) 333, or the government employee in *Lovett v. United States* (1946), 328 U.S. 303, change their "past" to comply with the statutes involved in their cases, can respondent change his to comply with 504. As to respondent and to others who are or may be similarly situated, the statute became upon its enactment and still remains *ex post facto* in its operation. It creates

a crime "one element" of which was conduct that was lawful before the statute was enacted. It establishes a five-year period during which persons are not allowed to comply with the law solely by virtue of the very fact (Communist Party membership) which, until the passage of the statute, was itself not criminal.

Moreover, that which has newly become an element of a criminal offense is not an act committed by Brown, but his past association with others. This fact, alone is used to identify him as a person to whom the new statute applies. Thus, its impact on Brown is made to depend solely on the taint which Congress has placed on an entire group, from whom Brown, through having been a member of the group, derives the infection. (*Thompson v. Utah* [1893], 170 U.S. 343; *Calder v. Bull*, 3 Dall. 3 U.S. [1798] 386; *Bouie v. City of Columbia* [1964], 378 U.S. 343.)

It appears to us that even the decision in *Douds*, on which the Government relies so heavily, affords no basis upon which the statute may be construed so as to prevent it from offending the prohibition against *ex post facto* laws and bills of attainder.

V

THE ARGUMENTS ADVANCED BY THE GOVERNMENT, BASED ON CONGRESSIONAL PREROGATIVE AND THE LEGISLATIVE HISTORY OF SECTION 504, ARE WITHOUT MERIT.

The Court of Appeals, distinguishing between a criminal statute and a law which provides for ad-

ministrative regulation, is for that reason taken to task as basing its decision on a ground characterized as "insubstantial". (Govt. Br. 43.) The Government's argument is that Congress could, if it chose, have substituted injunctive proceedings in place of 9(h) rather than criminal prosecution, with equally inhibiting effects against Communists; for then a person in the position of respondent Brown "could be enjoined and, if he were to disobey the injunction, criminal contempt proceedings might ensue. The prohibition would be equally absolute, and the 'discouragement' for all but secret Communist Party members would be as effective as any criminal penalty". (Govt. Br. 44.) From this it is said to follow that "the criminal nature of the sanction does not really exert more 'force' than if the remedy were civil", and hence it is immaterial whether Congress chooses the administrative procedure laid down by 9(h), or a procedure to obtain injunctions, or criminal prosecution as provided in 504. (Govt. Br. 44-45.)[19]

It is, to say the least, a refreshingly novel argument which the Government here advances. For what it amounts to, is that because Congress could allegedly empower the Secretary of Labor to obtain a court order to compel respondent to stay away from executive board meetings of his union, respondent cannot complain if Congress has instead chosen to accomplish the same result by clapping him into jail. This conclusion emanates from over-focusing attention

[19]The availability to Congress of less drastic measures than imposing criminal punishment is treated in an earlier section of our brief.

upon the "problem" which confronted Congress (Govt. Br. 14), to the exclusion of any concern for the rights of the individual. Once it is granted that the "problem" was a real and substantial one, and that concern with its solution is of overriding significance, how can anyone fairly challenge the determination of Congress to exercise virtually unlimited power in meeting it, even though the rights of the individual must be impaired as a result of the Congressional action? Of course, given such an assumed major premise, the conclusion follows quite logically. Rights which this Court has many times characterized as among the most precious possessed by any human being, get shunted aside.

It is worthwhile to ponder for a moment the precise process by which the foregoing conclusion is reached. Congress, it is said, is entitled to take this kind of action because it heard evidence that Communists "may call political strikes" (Govt. Br. 15); they perjure themselves (Govt. Br. 32); they file with the Government statements under oath containing lies (Govt. Br. 34); they are "responsive to the directions of a foreign-dominated power" (Govt. Br. 8); their "allegiance is to a cause which seeks the overthrow of the government by force and violence." (Govt. Br. p. 8.). This evidence is not the product of contested judicial proceedings, but of mere one-sided investigation. Utterly disregarded are the observations made in specific cases decided by this Court that Communists "carry on legitimate activities". (*American Communications Assn. v. Douds* [1950], 339 U.S. 382,

393); that, assuming illegal aims or activities of some members of the Party, 'it cannot automatically be inferred that all members shared their evil purposes or participated in their illegal conduct" (*Schware v. Board of Bar Examiners* [1957], 353 U.S. 232, 246); that "men in adhering to a political party or other organization notoriously do not subscribe unqualifiedly to all of its platforms or asserted beliefs" (*Schneiderman v. United States* [1942], 320 U.S. 118, 136; that "it is difficult to perceive how the requisite specific intent to accomplish such overthrow could be deemed proved by a showing of mere membership or the holding of office in the Communist Party" (*Yates v. United States* [1957], 354 U.S. 298, 331); that a person may not be punished "for his adherence to lawful and constitutionally protected purposes because of other and unprotected purposes which he does not necessarily share" (*Noto v. United States* [1961], 367 U.S. 292, 299-300); that Congress may not ignore "plainly relevant considerations such as the individual's knowledge, activity, commitment and purposes" (*Aptheker v. Secretary of State* [1964], 378 U.S. 500, 514); and that the justification for punishing an individual requires evidence that "must be sufficiently substantial to satisfy the concept of personal guilt * * *" (*Scales v. United States* [1961], 367 U.S. 203, 224-225). It will not do to substitute in a criminal case the suppositions underlying a Congressional conclusion, for the hard facts upon which a jury must act. The edifice created by the Founding Fathers prevents it. When a man is prosecuted in a criminal trial, the rules of the game must correspond to the

stakes that are involved, and they require strict adherence to the highest constitutional standards—adherence to "rigorous standards of proof." (*Noto v. United States* [1961], 367 U.S. 290, 291). This Court has said in words that cannot possibly be mistaken,

> "It need hardly be said that it is upon the particular evidence in a particular record that a particular defendant must be judged, and not upon the evidence in some other record or upon what may be supposed to be the tenets of the Communist Party." (*Noto v. United States, supra,* at 299.)

Evidently this not only needed saying; it needs to be said again.

If the Government is right in its position here, it would be just as sensible for Congress to choose any other "prophylactic measure directed at preventing future conduct" that it might seize upon. For it will be recalled that the Government's contention is that the discretion of Congress in this regard is unlimited in areas where conduct is regulated. (Govt. Br. pp. 15, 30.) Congress could then just as lawfully decide not to wait for Brown to be elected to office, but to eliminate the threat which his mere presence at a union membership meeting might present of contaminating his fellow members, and amend Section 504 so that it would punish him for membership in the union. It could just as logically disregard union membership, since the locus of a strike is the industry itself, and accordingly Congress could, with an addi-

tional slight amendment of Section 504, make it a crime for Brown to hold a job in the longshore industry. None of this is fanciful, since the thing that is legislated against is not conduct at all, but only the hypothetical chance that a particular person may engage in harmful conduct because someone else in his political party is said to have done so or attempted to do so at some other time and place. Of course, nothing would be simpler than to write a law punishing conduct, even quelling conduct at its first manifestation, for the Government is equipped with multiple processes by which strikes may be enjoined immediately they are commenced, or in fact intercepted in advance of their start. (See p. 47, *supra.*) With the mask taken off then, the statute stands revealed for what it is: an expression of such animosity toward Communism that it has led Congress to proceed in ways to which both reason and fact are strangers.

In still another respect, there would be no limit upon the uses to which Congress might employ the same device of fact-finding. In its duty to protect the purity of federal elections, Congress could prohibit participation of Communists therein, at least as candidates and perhaps as voters, upon the ground of their asserted interest in destroying our form of government. Congress could likewise utilize the same alleged predispositions and allegiances of members of the Communist Party to connect Party membership with an unlimited number of factual situations, and thereby make it criminal for Communists to seek even

to earn wages in any industry to which federal interest extends; with the growth of centralization everywhere evident, scarcely any pursuit would remain upon which Congress could not exert its force. The logical culmination of all such efforts would be for Congress, upon the basis of the alleged predilection of Party members to lie under oath, to enact legislation barring them from resort to the federal courts, whether as litigants or witnesses, in the interests of safeguarding the due administration of justice. If nothing else, this would be an effective means of expediting federal trials, particularly in those instances where the defendant happened to be a Communist, since his testimony would not be admissible at all; and by a related inference, neither might the testimony of those who were ready to come forward to give evidence in his defense.

Still a third avenue of oppression would be opened up. As the Court of Appeals correctly said, the power given by 504 is "not simply to remove the threat, but to punish it; and with no showing whatsoever that the act in fact is threatened by the person punished." (R. 259; 334 F2 at 495.) Arguing from its premise that Congress was merely adopting a "prophylactic measure directed at preventing future conduct" (Govt. Br. 16), the Government defends the logical application of the statute to persons "regardless of the particular member's activity or commitment" (Govt. Br. 22), saying Congress may draw its net more broadly to bring within the scope of the statute all those "who, according to objective and readily

determined criteria, are likely to present the danger." (Govt. Br. 47.) In short, we are led by one step to another, from punishing the holding of union office by a Communist to punishing virtually anything else, and from first applying punishment to those who intend and are able to produce harm, to those who concededly are not "committed" Communists; and all on the strength of Congressional "findings" and "prophylactic" regulations. It is small wonder that this Court has warned:

> "Broad prophylactic rules in the area of free expression are suspect." (*NAACP v. Button* [1963] 371 U.S. 415, 438.)

It is urged that labor unions have come to "occupy a unique position under this country's national labor policy, and their activities are subject to a full network of federal regulation which includes restrictions on the eligibility of candidates for union office (other than the one involved in this case) and the manner in which elections and other ballots are to be held. * * * It is certainly appropriate therefore, for Congress to protect these vessels of national economic policy against possible misuse * * *." (Govt. Br. 18-19.) The argument evinces a surprising degree of confusion concerning the subject matter. Apart from the fact, as our Statement shows, that the method in use in Local 10 for the nomination and election of officers is a model of excellence and integrity, which was fashioned by the membership several decades before Congress undertook to insure the purity of union elections, no more can be said of this kind of

federal regulation than that it is designed to protect, not eliminate, the right of union members to select their officers, and to strengthen, not destroy, guarantees for democratic participation of union members in their elections. The Government ignores the underlying question, which is: who is being protected against whom, and from what? In the "full network of federal regulation" to which Congress has now resorted, the purpose is manifestly to prevent a union from abusing the rights of its members, not to enable government to inflict abuse both on the union and its members under the claim that government may "protect."

Still more startling is the suggestion that the Congressional right to "protect" is justified by the fact that unions have become "vessels of national economic policy." We know it to be true that in the fascist state over which Mussolini ruled, labor unions were indeed "vessels of national economic policy" (Mussolini, Fascism, Ardita Publishers, Rome, 1935 at pp. 11, 46), and it would seem that unions occupy a like role in the Soviet Union (Vishinsky, The Law of the Soviet State, Macmillan Co., N.Y. 1948, at p. 622 et seq.); but it is news to us that the same concept of a servile trade union movement has now become part of the political system prevalent in the United States. We had always supposed that the relationship between unions and government was exactly opposite to that which is here asserted. When was it that there was overruled this Court's unanimous decision recognizing the imperative need "to preserve inviolate

the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means"? (*DeJonge v. Oregon* [1937], 299 U.S. 353, 365.)

It is said that 504 is "deeply rooted in reason and in sound policy judgments." (Govt. Br. 40.) But in the Government's discussion of the legislative history of the section, we are unable to find anything which justifies that statement. It may be supposed that the Government's brief presents the strongest product obtainable from an assiduous culling of the records of relevant legislative proceedings occurring prior to enactment of 504. Yet the Court is referred to nothing which indicates that Congress gave serious, or any, consideration to whether injunctive or administrative process might achieve its object quite as effectively as the resort to criminal prosecution. Nothing emerges from the hearings held by Congress to support the withdrawal of the permission allowed by 9(h) to discontinue Communist affiliations, and the substitution of a provision which, as we have shown, plainly offends the prohibition against *ex post facto* legislation and bills of attainder.

Neither are we referred to any evidence received by the Congress which clothes it with an expertise, thought to be not possessed by this Court, to determine the length of time that is reasonably necessary to enable a person to rid himself of the taint acquired

from political associations. If, in the absence of supporting evidence, or of experience with facts so commonly known that notice of them may be judicially taken, Congress can be said to have made a determination "rooted in reason and in sound policy judgments" in establishing a 5-year period of renunciation and penance before the ingrained characteristic of "threat" to our economy is dissipated, then it is equally valid to say that Congress may fix the time at 10 years, or 20, or perhaps 50. And since this is an area in which it is said that Congress has the "prerogative" of choosing the means, and that this choice is "entirely within Congress' discretion" (Govt. Br. 15, 30), this Court would be foreclosed from exercising the judicial power with which it is invested to invalidate a statute so patently irrational as to border on the irresponsible. Far from evincing that Congress was pursuing a course reasonably related to reaching a judgment "rooted in reason and in sound policy judgments", the legislative history would appear to be an effort to substitute decision by the exercise of legislative authority over matters which are reserved by the Constitution to resolution by the judicial process.

We submit that the arguments advanced by the Government which are said to be based on the legislative history of 504, and such evidence as has been elicited in support of those arguments, make out no case for the validity of that section. It follows that this Court is not required to attribute to the investigations which preceded the enactment of 504 a weight

to which the history of the section cannot properly lay claim. Particularly is this true in the case of a law affecting First Amendment rights.

> "In the area of First Amendment freedoms as well as areas involving other constitutionally protected rights, 'we cannot avoid our responsibilities by permitting ourselves to be "completely bound by state court determination of any issue essential to decision of a claim of federal right, else federal law could be frustrated by distorted fact finding."'" (*Cox v. Louisiana*, No. 24 this Term, fn. 8.)

When the fact finding process is distorted, even though its source is Congressional rather than state action, the same rule is to be applied in protecting First Amendment rights. (See *United States v. Carolene Products Company* [1938], 304 U.S. 144, 152, n. 4).

CONCLUSION

It has been shown, we submit, that 504 offends provisions of the Constitution in ways and to a degree that place the statute beyond any possibility of redemption. This in itself, if we are right, would warrant affirmance of the decision of the Court of Appeals, which ordered not only that the conviction under which Brown was sentenced be reversed, but held that the indictment be dismissed. We cannot believe that any result short of outright condemnation of the

statute would be consistent with frequently-expressed views of this Court by which guidance and clarity have been supplied to a full and accurate understanding of the purport of the Constitution's formidable obstacles to any whittling-down of the rights of the people.

But a decision which, though disposing of the immediate issues presented here by holding 504 unconstitutional on its face, did not lay at rest relevant questions of sizeable dimension because the foundations of decision were to be confined to more narrow compass than need be, would leave for tomorrow guidance that should be provided today. The Government strenuously urges that *Doüds* is controlling here. Though we think our brief plainly proves that the Government is in error, it cannot be disputed that a requisite of decision in this case must be a critical examination of *Douds*; and inasmuch as review is necessary, the fact that it is possible, as we have shown, to distinguish it on substantial grounds does not dictate the choice of that course for this Court. The Court of Appeals was manifestly bound by this Court's decision, hence its reading of *Douds*, together with a careful adherence to this Court's other decisions dealing with Communist Party membership, could properly lead it to no more than the conclusion which it reached, upon the distinction which it drew. No such limitation, however, prevents this Court from resting disposition of the case upon broader and more meaningful grounds. The fact that 9(h) has been repealed would seem to argue, not that the reasoning

of *Douds* concerning it should remain untouched, but rather that the circumstances for reconsideration of its rationale are more favorable. For one thing, no existing administrative procedures would be unsettled by a decision of this Court flatly disapproving *Douds*.

We are told in the Government's brief that 9(h) was essentially a serious and substantial mistake, for experience "demonstrated that there were significant flaws" in it, that "many * * * inequities and administrative difficulties * * * emerged during the twelve years of its enforcement," that it was filled with "shortcomings and inequities", and that it * * * proved to be "a circuitous and unworkable procedure which produced inequitable results." (Govt. Br. 9, 11, 36, 40.) It may be supposed that none of these characteristics or results was thought to present any real problem at the time the Government was persuading this Court, in *Douds*, to uphold that section. Doubtless the same argument was there advanced which we may read in the Government's brief today, that Congress enacted 9(h) under the same compulsions which we are now told prompted the adoption of 504, namely, that the provision was essential to deal with "a grave threat to our national economy" (Govt. Br. 8), "in the interest of public order" (Govt. Br. p. 13). Fifteen years have elapsed since *Douds*, during nine of which 9(h) proved to be wholly ineffectual, leading to its being discarded in 1959; and the remaining six constitute the period during which, except for the present case, 504 has been unused in regard to Communists. Yet nothing has occurred to suggest that the founda-

tions of the Republic have been imperiled. Experience and the lapse of time have served only to emphasize the slenderness of the reed upon which this Court was induced in *Douds* to accept a premise from which increased encroachment on constitutionally protected rights might derive encouragement.

There is nothing to prevent this Court from overruling *Douds*. The doctrine of "*stare decisis* is not, like the rule of *res judicata*, a universal, inexorable command" (*Burnet v. Coronado Oil & Gas Co.* [1932], 285 U.S. 393, 405, dissenting opinion of Mr. Justice Brandeis). In the light of experience and fresh opportunity for reflection, this Court has not infrequently overruled its constitutional decisions.[20] More than a century ago, Chief Justice Taney stated his position that

> "it be regarded hereafter as the law of this court, that its opinion upon the construction of the Constitution is always open to discussion when it is supposed to have been founded in error, and that its judicial authority should hereafter depend altogether on the force of the reasoning by which it is supported." *Smith v. Turner* (1849), 7 How. (48 U.S.) 283, 470).

The tragic consequences of permitting a wrong decision in the area of the basic freedoms to influence the development of national life for any considerable period of time have been cogently summarized for a unanimous Court by the Chief Justice in *Brown v. Board of Education* (1954), 347 U.S. 483 (overruling

[20]For a list of such cases, see dissenting opinion of Mr. Justice Brandeis in *Burnet, supra*, at pp. 407, n. 2 and 409, n. 4.

Plessey v. Ferguson (1896), 163 U.S. 537.) In *Plessey*, as in *Douds*, the error of the course adopted was penetratingly delineated in powerful words of dissent. It need not require the passage of decades before a mistake is rectified. This was shown when *Minersville School District v. Gobitis* (1940), 310 U.S. 586 and *Jones v. City of Opelika* (1942), 316 U.S. 584 were re-examined and overruled in the space of three years: *Murdock v. Commonwealth of Pennsylvania* (1943), 319 U.S. 105; *Jones v. City of Opelika* (1943), 319 U.S. 103; and *West Virginia State Board of Education v. Barnette* (1943), 319 U.S. 624.

The attempt to justify such legislation as 504 by the claim that Congress is confronted with a threat of "Communist control of labor unions" (Govt. Br. 18), is strongly suggestive of similar arguments that were advanced to support similar claims of the threat of existing danger to the state, and which produced similar solutions at the outset. The Germany of Hitler abandoned democratic government and exerted the force of the state in accordance with the noxious theory that the state is and of right should be all-powerful, and that Man's only role is to serve it. We do not imply that the impact of *Douds* is to be mentioned in the same breath with the awful consequences that befell the people of Germany when the rights of the individual were subordinated to the "higher" interests of the state. But any doctrine which permits Congressional experimentation with totalitarian methods of solving political problems by stripping minority groups, and individuals belonging to such groups, of substantial

liberties and freedoms, can only be productive of serious mischief to the country as a whole, and to all of the people in it. It is a pernicious doctrine, and it cannot be squared with the philosophy upon which the Constitution is based.[21]

> "Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard. It seems trite but necessary to say that the First Amendment to our Constitution was designed to avoid these ends by avoiding these beginnings. There is no mysticism in the American concept of the State or of the nature or origin of its authority. We set up government by consent of the governed, and the Bill of Rights denies those in power any legal opportunity to coerce that consent. Authority here is to be controlled by public opinion, not public opinion by authority." (*West Virginia State Board of Education v. Barnette* [1943], 319 U.S. 624, 641.)

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[21]"It must be acknowledged that the unrestrained liberty of political association has not hitherto produced, in the United States, the fatal results which might perhaps be expected from it elsewhere. The right of association was imported from England, and it has always existed in America; the exercise of this privilege is now incorporated with the manners and customs of the people. At the present time, the liberty of association has become a necessary guaranty against the tyranny of the majority.

* * * *

"The most natural privilege of man, next to the right of acting for himself, is that of combining his exertions with those of his fellow-creatures, and of acting in common with them. The right of association therefore appears to me almost as inalienable in its nature as the right of personal liberty. No legislator can attack it without impairing the foundations of society." (Alexis De Tocqueville, "Democracy in America", The New American Library, 1956, pp. 97 and 98.)

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.[22]

Dated, San Francisco, California,
March 12, 1965.

Respectfully submitted,
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[22]Contrary to the assertion of the Government (Govt. Br. 47, n. 16), Judge Hamley was eminently correct in his view that the nature of the executive board on which Brown served, presented a question of fact to be submitted to the jury. Congress has no more right to force acceptance upon the courts of a label called "executive board" whose applicability is irrefutably presumed in every case brought to trial, regardless of what the facts may be, than to legislate against speech as though it were "conduct", or to strip constitutional protections from a trial on a criminal charge by treating the subject matter as though it were adopting a mere "regulation". In this respect, the term "executive board" in the statute bears as little relationship to the evil which Congress was supposedly trying to reach, as Brown's presence at a meeting of the union's executive board does to the possible disruption of commerce. It is a fair assumption that the Government's vigorous opposition at the trial to the elicitation of any evidence concerning the true powers of the local executive board and the limitations thereon, may have proceeded from acquaintance with the fact that the board was executive in name only, utterly powerless in fact to call a strike, political or otherwise.

The fact, however, that the statute denies Sixth Amendment rights should not preclude consideration of other respects in which the legislation is fatally defective: here, as the majority opinion written by Judge Merrill shows, because of the substantial abridgements of rights guaranteed by the First and Fifth Amendments. (See *United States v. Gainey*, this Term No. 13, decided March 1, 1965, dissenting opinion of Mr. Justice Black, based on both Fifth Amendment and Sixth Amendment rights.)